

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 25, 2008

TO : Alan Reichard, Regional Director
Region 32

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SUBJECT: Stanford Hospital
Case 32-CA-23631

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by prohibiting union-represented food service employees from wearing "Where is Jesus?" stickers in protest of Union steward Jesus Andrade's suspension. We conclude that the Employer's reasonable belief that patients and customers would interpret the stickers as religious in nature and would be offended by them constituted special circumstances permitting interference with the employees' protected activity.

FACTS

The Employer operates an acute-care hospital and medical clinics in Palo Alto, California. Service Employees International Union, Local 715 (the Union) has been the bargaining representative of the Employer's service employees, including food service employees, since November, 1998. The parties' current collective-bargaining agreement is effective for the period January 20, 2006 through November 4, 2008.

On the morning of November 5, 2007,¹ seven of the Employer's public cafeteria workers began wearing stickers bearing the words "Where is Jesus?" The stickers were supplied by the Union and referred to the Union's chief shop steward, Jesus Andrade, who had recently been suspended.² The stickers did not in any way indicate that they were generated or sponsored by the Union. All of the

¹ All dates are in 2007 unless otherwise noted.

² Andrade apparently had been accused by a customer of allowing another customer to leave the cafeteria without paying for his food.

employees who wore the stickers work in customer service areas of the cafeteria and were visible to customers using the cafeteria. The cafeteria is frequented by patients, patients' families, employees and members of the public.³

Employer managers told the employees to remove the stickers because they were not "part of the uniform" and were a "form of promotion." One employee witness testified that a manager told her she would be discharged if she refused to remove the sticker. The Employer denies threatening termination but admits that it told employees that it would be insubordinate to refuse to remove the stickers. The Employer acknowledges that its managers understood that the stickers referred to stop steward Andrade and the dispute regarding his suspension. The Employer asserts, however, that it asked employees to remove the stickers because it was concerned that customers would read the "Where's Jesus?" statement as a reference to Christianity and could be offended by that.⁴

The Employer has permitted employees to wear other union buttons and union-related paraphernalia in the hospital and in the food service department without interference. For example, during the last contract negotiations, the Employer did not prohibit employees from wearing stickers stating "We Support our Negotiating Team."

³ There is a dispute regarding the size of the stickers (the Union claims they were 1.5 inches long; the Employer claims they were 4 inches by 5 inches), and the Union has failed to produce them in response to the Region's requests. In any event, they were large enough to be read by customers, as evidenced by the fact that at least one customer asked an Employer manager about the reference to "Jesus."

⁴ The Employer asserts that it told employees this when asking them to remove the stickers. The only employee witness from whom the Region was able to get cooperation denies that assertion.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because the Employer has demonstrated special circumstances permitting its limitation on the wearing of these Union-related insignia.

It is undisputed that the employees' wearing of the "Where is Jesus?" sticker was protected concerted activity related to an ongoing dispute between the Union and the Employer, and was therefore subject to the Act's protection absent the Employer's establishment of "special circumstances."

With regard to the "special circumstances" defense, the Board has long held that employers in a retail setting may be entitled to shield the public from certain kinds of slogans and images in order to protect the Employer's public image. In such cases, the Board considers whether wearing a particular insignia would likely affect the Employer's marketing of its product or service to the public, which includes a consideration of whether the words/images are provocative or offensive.⁵ Although some of the cases where the Board has found union insignia to be unduly offensive involved profane or inflammatory language, the Board has also found union insignia to be unduly offensive, even where the language was not profane or inflammatory, where the substance of the message on the insignia had a strong potential to alienate the employer's customers.⁶ In establishing a reasonable concern that a message on an insignia would provoke, offend, or alienate

⁵ See, e.g., Noah's New York Bagels, 324 NLRB 266, 275 (1997) (employer could prohibit tee-shirt stating "If its not Union, its not Kosher" because it unduly interfered with employer's public image as a purveyor of kosher products); Pathmark Stores, 342 NLRB 378, 379 (2004) (employer had reasonable belief that ambiguous tee-shirt slogan "Don't Cheat About the Meat" would have an inappropriate negative impact on customers); Bell-Atlantic-Pennsylvania, 339 NLRB 1084, 1087 (2003) (deferring to arbitral finding that employer had reasonable belief that "road kill" tee shirt, depicting employees as a squashed carcass lying in a pool of blood, was provocative and would adversely affect legitimate business interests).

⁶ See, e.g., Noah's New York Bagels, *supra*, at n. 5.

customers, an employer need not produce evidence of any actual effect on customers.⁷

Here, the cafeteria is a retail setting and the stickers were clearly visible to patients and customers there. We further conclude that customers and patients patronizing the cafeteria would likely understand the statement on the stickers as a reference to the biblical Jesus. Thus, the stickers did not contain any Union insignia, did not use Jesus Andrade's full name, and did not provide any other information that would enable someone unfamiliar with the situation to know that the stickers referred to Andrade rather than the biblical Jesus.

Therefore, the only question is whether it was reasonable for the Employer to believe that customers would be seriously offended by the "Where's Jesus?" message. We agree with the Region that, consistent with Noah's Yew York Bagels and similar cases, the Employer had a reasonable basis for believing that the substance of this message would offend and alienate customers. Thus, Christians might consider it to be an irreverent and inappropriate use of the name of God, and/or a provocative way of questioning the existence of Jesus or of God. Non-Christians might consider it to be a distasteful promotion of Christianity, i.e., a suggestion that there was insufficient awareness or acknowledgement of Jesus at the facility. It was not unreasonable, therefore, for the Employer to want to prevent the alienation of its customers by restricting a potentially offensive message that was not necessary to convey the essence of the labor dispute.

We further note that the Employer has permitted the wearing of other Union paraphernalia that publicized labor issues, such as contract negotiations. In these circumstances, employees would not be restrained or coerced from wearing similar paraphernalia that did not convey a potentially offensive religious message.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.

⁷ Pathmark Stores, 342 NLRB at 379.